SEAL v. VIRGINIA PORTLAND CEMENT CO.

Nov. 19, 1908.

[62 S. E. 795.]

1. **Pleading** (§ 53*)—**Repugnant Counts.**—A declaration for personal injury to an employee is not defective because one count charges that defendant promised to remedy the defect causing the injury and another charged that defendant assured plaintiff that there was no danger and directed him to continue the work, as a plaintiff can present his case with such variation of statement as he thinks necessary to meet every possible phase of the testimony.

[Ed. Note.—For other cases, see Pleading, Cent. Dig., §§ 114, 116; Dec. Dig., § 53.*]

2. **Master and Servant** (§ 256*)—**Injury to Employee—Pleading—Sufficiency.**—A declaration for injury to an employee is sufficient, where it shows the relation between the parties, defendant's duty to plaintiff, defendant's failure to discharge that duty, and resulting injury, and states such facts as would enable the court to say on their proof that they established a good cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig., §§ 809-843; Dec. Dig., § 256.*]

3. **Pleading** (§ 204*)—**Defective Count—Effect.**—That one of several counts is defective does not warrant a demurrer to the whole declaration and dismissal of the action.

[Ed. Note.—For other cases, see Pleading, Dec. Dig., § 204.*]

4. **Master and Servant** (§ 258*)—**Injury to Employee—Pleading—Sufficiency.**—A declaration for injury to an employee is sufficient, though it does not expressly state that the injury was due to defendant's negligence, where the manner in which the negligent acts caused the injury are set out with sufficient clearness to enable defendant to understand the case made and to know what he must meet.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig., §§ 816-836; Dec. Dig., § 258.*]

Error to Circuit Court, Augusta County.

Personal injury action by L. H. Seal against the Virginia Portland Cement Company. From a judgment sustaining a demurrer to the declaration, plaintiff brings error. Reversed and remanded.

Charles & Duncan Curry and *Timberlake & Nelson,* for plaintiff in error.

Patrick & Gordon, for defendant in error.

HARRISON, J. In this case the plaintiff has set forth his cause

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

of action in a declaration containing three counts. The defendant company demurred to the declaration and to each count thereof, and the circuit court sustained the demurrer, upon the ground that the second count was repugnant to the first and third counts, and dismissed the case.

This was manifest error. The alleged repugnancy consisted in the statement in the first and third counts that the defendant, after its attention was called to the danger, promised to remedy it, and the statement in the second count that it assured the plaintiff that there was no danger and directed him to continue the work. Had these two allegations appeared in one and the same count, as occurring at one time, they would have been inconsistent and repugnant. Each count, however, is a separate declaration, and the plaintiff has the right to present his case with such variation of statement as he thinks necessary to meet every possible phase of the testimony. This is one of the objects and purposes of adding several counts, so that, if the plaintiff fails in the proof on one count, he may succeed in another and thereby prevent a fatal variance. B. & O. R. Co. *v.* Whittington's Adm'r, 30 Grat. 805, 811; New River M. Co. *v.* Painter, 100 Va. 507, 510, 42 S. E. 300; Barton's Law Pr. vol. 1, p. 300.

It is the universal practice in this state, in tort cases, for the plaintiff to present his case in different counts, varying his statements in each count to meet the different phases of the testimony at the trial; and the action of the circuit court in sustaining the demurrer to the declaration, upon the ground of repugnancy between the counts, was contrary to this general practice and to the decisions of this court.

The contention that the plaintiff has not stated his cause of action with sufficient particularity cannot be sustained. The declaration, and each count thereof, shows the relation between the plaintiff and the defendant, the duty of the defendant to the plaintiff, the failure of the defendant to discharge that duty, and the resulting injury to the plaintiff. The declaration clearly informs the defendant of the nature of the demand against it, and states such facts as would enable the court to say, if the facts were proven as alleged, that they established a good cause of action. Under such circumstances the cause of action is stated with sufficient particularity. Hortenstein *v.* Va. Carolina Ry. Co., 102 Va. 914, 47 S. E. 996; Wheel Co. *v.* Harris, 103 Va. 712, 49 S. E. 991; Lane Bros. *v.* Seakford, 106 Va. 93, 55 S. E. 556; Lynchburg Traction Co. *v.* Guill, 107 Va. 86, 57 S. E. 644.

The contention that the allegations of duty are so blended in the declaration as to make it bad on demurrer is without merit, and need not be discussed.

It is further insisted by the defendant in error that on the case

stated in the declaration the plaintiff assumed the risk incident to the work and therefore cannot recover.

The only suggestion in support of this contention, necessary to be noticed, is that the first and third counts each allege that the accident occurred after a reasonable time had elapsed for changing the alleged dangerous method of doing the work. The first count is not amenable to this objection. The third count does say that the accident occurred after the defendant had had a reasonable time to make the change in question. The contention is that, as soon as the period contemplated for the removal of the dangerous condition has terminated, the servant's position is precisely what it would have been if no promise to remedy the dangerous method had been given; in other words, that the plaintiff reassumed the risk. Conceding this to be true, and that the third count was defective in the particular pointed out, it was not ground for sustaining the demurrer to the whole declaration and dismissing the action. The plaintiff should have been afforded an opportunity to amend the third count, if so advised; otherwise, to proceed to trial upon the first and second counts.

Finally, it is insisted that the declaration does not attribute the injury to the defendant negligence.

It is true that the declaration does not state, in so many words, that the injury was due to the negligence of the defendant; but the manner in which the alleged acts of negligence caused the injury are set out with sufficient fullness and clearness to enable the defendant to understand the case made, and to know what he is to meet. This is all that is required. Dingee *v.* Unrue, 98 Va. 247, 35 S. E. 794.

For these reasons, the judgment complained of must be reversed and the case remanded to the circuit court, with leave to the plaintiff to amend the third count of his declaration, and for further proceedings.

Reversed.

Note.

Repugnancy in Pleading.

Common Law Pleadings.—A declaration is bad on general demurrer if it contains inconsistent or repugnant allegations respecting material matter.

Cases of Repugnancy in Declaration.—In trespass, where the plaintiff declared for taking and carrying away timber lying in a certain place for the completion of a house then lately built the declaration was held bad, since the timber could not be for a house already built. Nevil *v.* Soper, 1 Salk. 213.

In covenant against an apprentice, the plaintiff assigned for breach that the apprentice, before the time of his apprenticeship expired, durante tempore quo survivit, departed from his master's service. The defendant demurred and had judgment because the declaration was repugnant, for it should have been durante tempore quo servire debuit. Nevil *v.* Soper, 1 Salk. 213.

In Greaves *v.* Neal, 57 Fed. Rep. 816, the plaintiff sued to recover the value of property alleged to have been acquired by the defendants by an unlawful preference. The declaration referred to an assignment, annexing it in such a way as to make it a part of the pleadings, and alleged that the insolvent person assigned "for the equal benefit of all his creditors who should file releases," but the annexed assignment was expressed to be "for the benefit of all his creditors without any preference." It was held that the declaration was demurrable for repugnancy.

The averment that the plaintiffs are citizens of New York, to wit, of Illinois, where the suit is brought, is repugnant. Leavitt *v.* Cowles, Fed. Cas. No. 8,171 (2 McLean 491).

A declaration, the commencement of which styles the plaintiff "executor," and which subsequently avers that he took out letters of administration, is confused, and therefore defective. Rowan *v.* Lee, 26 Ky. (3 J. J. Marsh.) 97.

A count in assumpsit, declaring on a promise to pay a sum certain if the plaintiff would provide another with necessaries, and also on a promise to pay as much as the plaintiff reasonably deserved to have on the same account, was held both double and repugnant. State *v.* Haven, 59 Vt. 407, citing 1 Chitty on Pleading 231.

Cases of No Repugnancy in Declaration.—In a suit brought by a purchaser of negotiable paper at the sale of a bank's assets, made by its trustees under the act of 1850, an allegation in the declaration that the charter was surrendered, but was continued by virtue of the provisions of the several acts for the settlement of the bank's affairs, is not repugnant or contradictory when construed with reference to those acts, which mean simply that although the charter was surrendered, the corporation was not ipso facto dissolved, but its existence was continued by operation of law for the purpose of settling its affairs according to the provisions of the statute. Savage *v.* Walshe, 26 Ala. 619.

In an action on a promise to pay a sum of money to the plaintiff if and when the defendant should collect certain demands against a third person, it was held that there was no repugnancy between a count alleging that the defendant did not use due diligence to collect such demands and a count alleging that there were no such demands. White *v.* Snell, 9 Pick. (Mass.) 16.

Rule Qualified.—The rule that a declaration is bad where it contains repugnant allegations respecting matters of substance is confined to single counts; repugnancy between different counts of a declaration does not make the pleading objectionable, because the very object of several counts where but one cause of action exists is to vary the statement of the case so that some one count may correspond to any possible phase the case may assume on the evidence. Barton *v.* Gray, 48 Mich. 164, opinion of Cooley, J.

A plea is bad on general demurrer where it contains repugnant allegations respecting material matter. Wright *v.* Card, 16 R. I. 719; Barber *v.* Summers, 5 Blackf. (Ind.) 339; Gulliver *v.* Fowler, 64 Conn. 556.

Where the defendant pleaded a grant of a rent out of a term of years, and alleged that by virtue thereof he was seized in his demesne, as of freehold, for the term of his life, the plea was held bad for repugnancy. Butt's Case, 7 Coke 25.

In an action of debt against the surety on a replevin bond, the defendant, in the beginning of his plea, pleaded by way of confession and avoidance matters which were claimed to operate as a release

from liability for the breaches alleged, thus in effect admitting the breaches, and in the latter part of the plea he pleaded general performance, thus in effect traversing or denying the breaches. The plea was held bad for repugnancy. Wright *v.* Card, 16 R. I. 719.

An averment in a plea that the contract on which the cause of action was brought, and no part thereof, was made specially payable in the county, is insufficient for uncertainty and repugnancy. Moffat *v.* Dickson, 3 Colo. 313.

In an action on a note given for land, averments in the plea that plaintiff was not seised of the land, and that his wife has a right of dower therein, are inconsistent. Wann *v.* McGoon, 3 Ill. (2 Scam.) 74.

In a suit on an appeal bond, a plea averring that the appeal was prosecuted with effect, and that the principal on the bond paid the amount of the judgment affirmed, is bad, on demurrer, for repugnancy. Mix *v.* People, 92 Ill. 549.

In an action by a bank on a note, the answer of the maker stated that the note was given in part payment of a machine purchased of A.; that the machine was sold on a written warranty of which there had been a breach; that the bank did not become the owner or holder of such note till after maturity, "or, if it did become such owner, it was only for the purpose of collecting the same for A., or with the agreement and understanding with A. that A. would keep the bank whole and harmless." Held, that such answer was demurrable for repugnancy, as one material statement, following the other, but coupled by the disjunctive "or," rendered the whole nugatory and meaningless. Second Nat. Bank *v.* Hart, 8 Ind. App. 19, 35 N. E. 302.

In debt on a bond to perform the conditions in an indenture of lease, the defendant pleaded a rescission and cancellation of the lease by mutual consent. A replication admitting those facts, but alleging a parol agreement that the lease was to remain in force, and that the bond should remain in force to secure the performance of the conditions, was held bad for repugnancy. Sibley *v.* Brown, 4 Pick. (Mass.) 137.

The fact that two or more pleas are repugnant to each other is no objection to either of them when they are filed together. True *v.* Huntoon, 54 N. H. 121; Murrell *v.* Jones, 40 Miss. 573. See, also, St. Louis, etc., R. Co. *v.* Whitley, 77 Tex. 126; Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 475.

Where a declaration contains several counts and a verdict for the plaintiff has been applied to a good count, it is no ground for arrest of judgment that another count is repugnant to the count to which the verdict was applied. White *v.* Snell, 9 Pick. (Mass.) 16.

Equity Pleadings.—The bill and answer in equity pleading is subject to the objection of inconsistency or repugnancy, in like manner as the declaration and plea.

There is no objectionable repugnancy between the averments of a bill to cancel a deed as a cloud, averring that the grantor's signature was obtained by fraud and undue influence, and that it is inoperative, because never in fact delivered, but that, if complainant is mistaken as to the fact of delivery, it was procured by fraud and undue influence. Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528.

In a suit to set aside a conveyance of real estate for fraud against creditors, there is no inconsistency in averring the grantee to be a fictitious person, and that the deed was made to such grantee with the intent to hinder and defraud creditors. Purkitt *v.* Polack, 17 Cal. 327.

A complaint does not contain inconsistent causes of action because

it asks that a deed be canceled as having been procured by fraud, and that, in case it is found to be valid, plaintiff may recover the contract price, and have a vendor's lien. Humphrey *v.* Ringler, 94 Iowa 182, 62 N. W. 685.

If an original and an amended bill in equity allege repugnant grounds for relief, the bill as amended is demurrable. Winter *v.* Quarles, 43 Ala. 692. See, also, Magnetic Ore Co. *v.* Marbury Lumber Co., 113 Ala. 306.

DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

SELDEN et ux. *v.* WILLIAMS et al.

Sept. 10, 1908.

[62 S. E. 380.]

1. Judgments—Assignment—Rights of Assignee.—The recovery by the payee of judgment on a note against the maker destroys its further negotiability, and the judgment is not a nonnegotiable chose in action, the assignee taking it subject to all the equities of the debtor against the assignors existing at the date of the assignment or which arise after the assignment and before the debtor has notice thereof, even though the assignee takes the assignment for value, bona fide, and without notice of the equity.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 30, Judgment, §§ 1556-1558.]

2. Assignments—Rights of Assignee.—The assignee of a nonnegotiable obligation can take no rights which his assignor did not possess, and can generally make no defense he could not make.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 4, Assignments, §§ 162-165.]

3. Judgment—Assignment—Defenses against Assignee—Estoppel.—Where the payee of a note deposited it with a bank as collateral security for a loan less than the amount of the note, and thereafter the bank recovered judgment against the makers for the face value, the makers, after paying the debt for which the note was deposited as collateral, were not estopped by their failure to defend a chancery suit by the bank to subject certain property of the makers to the lien of the judgment from setting up any equities they had against the judgment in a suit thereon by the assignee thereof.

4. Same.—Code 1904, § 3299, provides that, in an action on a contract, defendant may file a plea alleging any such failure in the